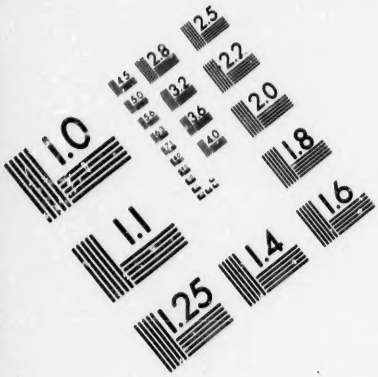

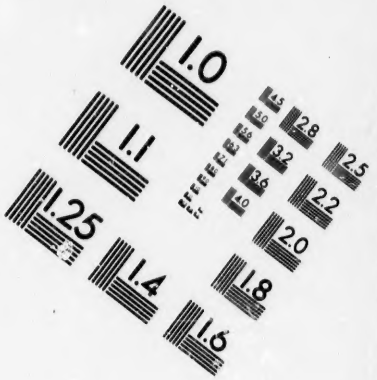

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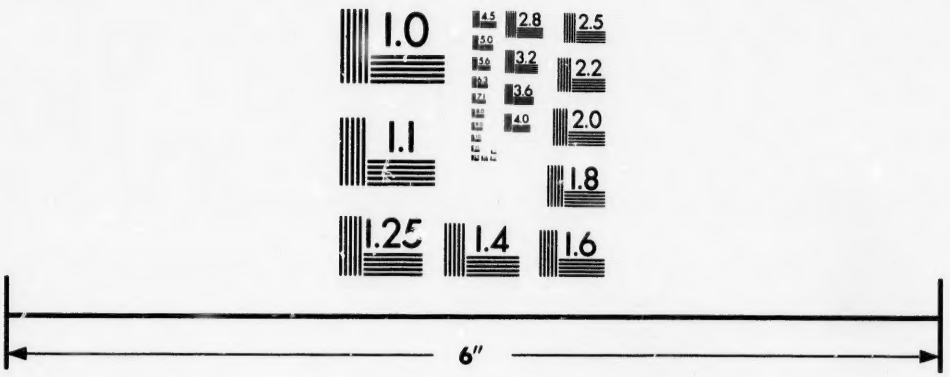

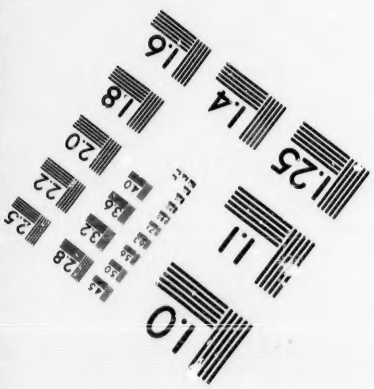

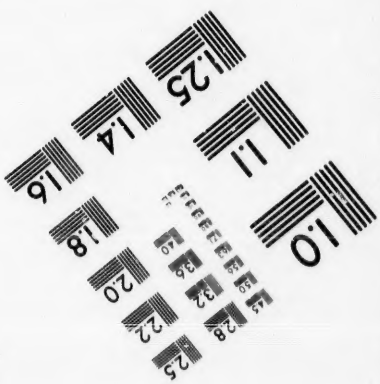

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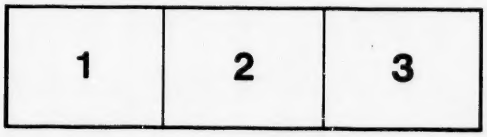

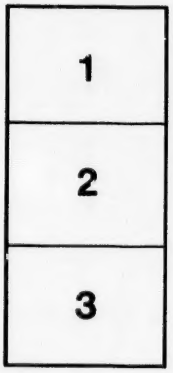

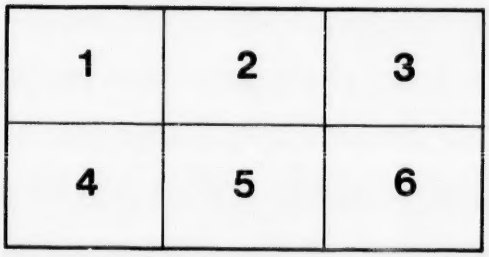

PRVINCE OF LOWER CANADA, } **COURT OF APPEALS.**

IN A CAUSE Between

NAPIER CHRISTIE BURTON,

Appellant,

AND

ALEXANDER PHELPS,

Respondent,

THE RESPONDENT'S CASE.

THIS APPEAL originates in an Action of *Revendication* or Detinue brought by the Appellant in the Court of King's Bench at Montreal, against the Respondent, for the recovery of two thousand Masts, two thousand Yards, two thousand Spars, two thousand logs, all of Pine Timber, and two thousand Pieces of square Pine timber, and two thousand logs of Oak timber, and two thousand pieces of square Oak timber, alledged to belong to the Appellant, and to be in the possession of the Respondent, with damages.

To this Action the Respondent pleaded 1st. Non detinet. 2d. That on the sixth day of April, one thousand seven hundred, and thirty three, Lewis the 15th. King of France then lawful Sovereign of Canada, by the Marquis de Beauharnois, Governor and Lieut. General in Canada, and Giles Hocquart, Intendant of Justice &c. by Deed of Concession made on that day, did give, grant, and concede to Chaussegros De Lery, his heirs and assigns, a certain Tract of Land, of two leagues in front along the River Chambly, by three leagues in depth, bounded &c. to have and to hold the said land and premises to the said Chaussegros De Lery, his heirs, and assigns for ever, by and under the title of a Fief and Seigniory, "*à titre de Fief et Seigneurie, haute, moyenne, et basse Justice,*" subject to fealty and homage &c. reserving, nevertheless, to his most christian Majesty, from and out of the said gift, grant and concession, all oak timer trees on the said land and premises fit to be used in the building of vessels for the royal navy (*à la charge de conserver et faire conserver par ses ténanciers les bois de chêne propres pour la construction des vaisseaux du roi,*) and under and upon other the reservations, terms and conditions in the said deed of concession contained. That the said Chaussegros De Lery, by virtue of the said deed of concession, afterwards, on the day and year aforesaid, entered upon, and became possessed of the said land and premises, and thereof became and was the true and lawful proprietor, subject, nevertheless, to the reservations, and upon the terms and conditions in the said deed contained, and the land and premises have since continued, and now are in the possession of a person or persons, whose rights and title thereto have been, and are derived from and under the said deed of concession.—That, afterwards, on the twenty second day of March, one thousand, seven hundred and forty three, his said most christian majesty, by and through his said governor and lieutenant general, and intendant, by a deed of concession made on that day, did give, grant and concede to Daniel Lionard De Beaujeu, his heirs and assigns, a tract or parcel of land of two leagues in front by three leagues in depth, begining at the boundary of the seigniory of Chaussegros De Lery, on the side thereof nearest to lake Champlain, comprising the river called "*à la Colle*" bounded &c., to have and to hold the said last mentioned tract of land and premises to the said Daniel Lionard de Beaujeu, his heirs and assigns for ever, by and under the title of a fief and seigniory, "*à titre de fief et seigneurie, haute, "moyenne et basse justice,*" subject to fealty and homage, reserving, nevertheless,

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less, to his said most christian majesty, out of and from the said gift, grant and concession, all oak timber trees, on the said premises, fit to be used in the building of vessels for the royal navy, (*" à la charge de conserver et faire conserver " par ses ténanciers les bois de chêne propres pour la construction des vaisseaux " du roi,"*) and under and upon other the terms and conditions in the said deed of concession mentioned and contained. That the said Daniel Lionard De Beaujeu, by virtue of the said deed of concession, afterwards, on the day and year last aforesaid, entered upon and became possessed of the said last mentioned tract of land and premises, and thereof by virtue of the said deed of concession became, and was the true and lawful proprietor, subject to the reservations, and upon the terms and conditions in the said deed of concession contained, and the said tract of land and premises have since continued, and now are in the possession of a person or persons whose right and title thereto have been and are derived from and under the said deed of concession.—That afterwards, on the eighth of July, one thousand, seven hundred and forty three, his said most christian majesty then lawful sovereign of Canada, by and through his said governor and lieutenant general and intendant, by a deed of concession made on that day, did give, grant and concede to Chavoy de Noyan, his heirs and assigns, a certain tract or parcel of land of two leagues in front, along the river Chambly, by three leagues in depth bounded &c. To have and to hold the said last mentioned tract of land &c. to the said Chavoy de Noyan, his heirs and assigns for ever, by and under the title of a fief and seigniory, *" à titre de fief et seigneurie, haute, moyenne et basse " justice,"* subject to fealty and homage, reserving, nevertheless, to his said most christian majesty, out of and from the said gift, grant and concession, all oak timber trees on the said last mentioned premises, fit to be used in the building of vessels for the royal navy, (*"à la charge de conserver et faire conserver " par ses ténanciers les bois de chêne propres pour la construction des vaisseaux " du roi."*) and upon other the reservations, terms and conditions in the said deed of concession contained. That the said Chavoy de Noyan by virtue of the said deed of concession, afterwards, on the day and year last aforesaid, entered upon and became possessed of the said premises therein and thereby given and thereof by virtue of the said deed of concession became and was the true and lawful proprietor, subject, nevertheless, to the reservations and upon the terms and conditions in the said deed of concession, contained, which said last mentioned premises have since continued and now are in the possession of a person or persons, whose right and title thereto have been and are derived from and under the said deed of concession.—That by the conquest of Canada afterwards made by the arms of our Sovereign Lord the now King, and under and by virtue of the treaty of peace made between our said Lord the now King and his said most Christian Majesty, on the 10th February, one thousand seven hundred and sixty three, our said Lord the now King having become and being vested with all and every the rights of Sovereignty, property and possession, and all other the rights which his said Christian Majesty, before and at the time and times aforesaid, had upon, over and in respect of the said country called Canada, and the lands, places and inhabitations therein, and more particularly with all and every the rights which under and by virtue of the reservations, clauses, matters and things in the said several deeds of concession belonged to his said most Christian Majesty, or to which his said most Christian Majesty, by reason thereof was in any wise entitled, afterwards, on the 2d. October 1807, by his royal licence directed to Sir John Wentworth, baronet, surveyor general &c. did give leave, licence, and permission to Christopher Idle, John Idle, George Idle, Thomas Coates and William Haynes of the Strand &c. merchants, trading under the name or firm of Scott, Idles & Co. by the name and description of Messrs. Scott, Idles & Co. their agents and workmen, to travel into and search his Majesty's woods in his Majesty's provinces of Upper and Lower-Canada, where the property in any woods or trees and the right of cutting them were reserved to his Majesty, and there fell and cut so many goods and sound trees as might answer the number and dimensions, mentioned in a certain contract entered into by the principal officers of His Majesty's navy with the said Christopher Idle, John Idle, George Idle, Thomas Coates and William Haynes in his Majesty's said royal licence and warrant mentioned and referred to and to carry the said trees through his Majesty's said woods to the water side, in order to the transporting and carrying them into his Majesty's stores without incurring any penalty or forfeiture by reason thereof.—That his Majesty's provinces of Upper and Lower-Canada in the said

royal

licence or warrant mentioned do respectively make part and parcel of the country heretofore, called Canada, in the said deeds of concession mentioned, and that the lands and premises, thereby given, granted and conceded are situated in that part of the province of Lower Canada known and distinguished by the name, of the district of Montreal.—That by virtue of the said royal licence and warrant, the said Alex. Phelps as the workman and servant of the said Christopher Idle, John Idle, George Idle, Thomas Coates, and William Haynes, and by their command before the 13th of March, one thousand, eight hundred and nine, in the declaration mentioned, did enter upon the lands and premises in and by the aforesaid deeds of concession, given, granted, and conceded, and by virtue of the said reservations and conditions, and of the said royal licence or warrant did there fell and cut, two hundred and ninety three oak timber trees, being oak timber trees fit to be used in the building of vessels, for the royal navy, and being trees wherein the property was reserved to our Lord the King, and being good and sound trees answering the dimensions, and to answer the number mentioned in the said contract in the said royal licence or warrant referred to, for and towards the fulfillment of the said contract, to be transported and conveyed into his Majesty's stores, as in the said royal licence or warrant is mentioned.—That the said two hundred and ninety three oak timber trees so felled and cut as aforesaid from the time of felling and cutting the same up to the time of the seizure under the writ of attachment in the said cause issued constantly remained and were in custody of the said Alexander Phelps, as workman and servant as aforesaid, and are part of the timber unjustly demanded by the said Napier Christie Burton.—That by reason of the premises, the said two hundred and ninety three oak timber trees &c. before and at the time of suing out the writ of attachment in the said cause were and have since continued, and now are the proper goods and chattels of our said Lord the King, and at the time and times aforesaid were in the lawful possession of the said A. Phelps as workman and servant as aforesaid, for the use of the King and for the interest and purposes in the said licence or warrant mentioned.—The 3d. plea alledges that the King on 2d. October 1807 was seized as owner and proprietor, and was lawfully entitled to all and singular the oak timber trees fit to be used in the building of vessels for the royal navy which were then standing, growing and being upon a fief and seigniory called the seigniory of De Lery situated &c.—and in and upon the domain within the same, and also in and upon a certain other fief and seigniory called the seigniory of La-Cole, situated &c., and in and upon the domaine &c. within the same, and in and upon a certain other fief and seigniory called the seigniory of Noyan, situated &c. and in and upon domaine and land within the same &c.—and being so seized and possessed, and lawfully entitled to the said oak timber trees, the King, on the day and year last aforesaid, gave licence to Christopher Idle, John Idle, George Idle, Thomas Coates and William Haynes, their agents and workmen to enter into and upon the said fiefs and seigniories &c. and there fell and cut down certain of the said last mentioned trees to be transported &c. and conveyed into his Majesty's stores for his Majesty's use, by virtue of which said licence, the said A. Phelps as workman and servant of the said Christopher Idle, John Idle, George Idle, Thomas Coates and William Haynes, and by their command did enter upon the said fiefs and seigniories and did there fell and cut two hundred and ninety three timber trees, being oak timber trees fit to be used in the building of vessels for the royal navy, and being oak timber trees, whereof the King was seized, and to which he was entitled as aforesaid, and the said oak timber trees did cut and convert into two hundred and ninety three logs and pieces of oak timber, which are part of the timber in the said declaration mentioned and thereby unjustly demanded.—That the said last mentioned logs and pieces of oak timber before and at the time of suing out the writ of attachment in the said cause were and are of the proper goods and chattels of the King, and at the time and times aforesaid, were in the possession and custody of the said A. Phelps as workman and servant as aforesaid &c.

The fourth plea alledges that the King on the 2d. October 1807 was seized as owner and proprietor of the seigniories mentioned in the preceding pleas, and being so seized the King afterwards, on the day and year last mentioned, gave licence to Christopher Idle, John Idle, George Idle, Thomas Coates and William Haynes &c. (the particulars of the licence and the cutting of timber under it are here stated as in the preceding plea.)

To the 1st. plea the said Napier Christie Burton replied that the Appellant did detain the said timber &c.—To the 2d. that his most christian majesty did not reserve any oak timber as stated in the said plea, and that the King did not give

give licence to enter upon the said lands &c. and the said A. Phelps did not cut the said trees as workman and servant of Christopher Idle, John Idle, George Idle, Thomas Coates and William Haynes—to the 2d. and 4th. pleas, that the King on the 2d. Oct. 1807 was not seized as owner and proprietor of or entitled to any oak timber trees on the said seigniories, and that the King, in the said last mentioned day, was not seized as owner and proprietor of the said seigniories, and that the King did not give licence as stated in these pleas—and the Appellant did not cut as workman &c.—The Appellant Napier Christie Burton adduced parole evidence for the purpose of proving the facts stated in his declaration, but did not produce, or fyle any written evidence to show a title in him to the land upon which the timber in question was cut.—The Respondent Alexander Phelps established by evidence the several facts mentioned in his pleas.

On the 16th October 1811, Christopher Idle, John Idle, George Idle, Thomas Coates and William Haynes, merchants, and copartners trading under the firm of Scott, Idles & Co., named in the King's licence mentioned in the said Plea of the said Alex. Phelps, fyled a petition in Intervention in the said cause.

In this petition they urge the same grounds contained in the said plea, and conclude that the timber attached, and in question in the said cause, be delivered up to them for the purposes in the said licence mentioned.

To this petition in Intervention, the Respondent Napier Christie Burton, put on a plea by which he pleaded that the said Christopher Idle, John Idle, George Idle, Thomas Coates and William Haynes had no interest in the said cause, and denied the truth of th grounds contained in the said petition.

The cause was heard on the merits on the 11th February 1813, and on the 19th June following the Court below pronounced the following interlocutory Judgment.

" It appearing to the Court, from the nature of the contest between the " parties in this cause, that the right of the Crown may be eventually interested " therein, it is ordered that at the deligence of the Defendant, a copy of the De- " claration and pleadings in this Cause be communicated without delay to His " Majesty's Attorney General in this Province, that he may intervene on behalf " of the Crown, if he shall see fit on or about the first day of October next."

On the 13th October 1814, an information in the nature of an Intervention was fyled on the part of the Crown, in which the same grounds are urged against the Appellant's action, as those contained in the aforesaid plea of the said Alex. Phelps.

A plea to the Intervention of the Crown was fyled by the Appellant, in which he alledges that the King has no interest in the said action, and denies the truth of the grounds contained in the said Intervention.

The parties afterwards were finally heard on the merits, and the Court below, after this hearing, on the 20th. of June 1815 pronounced the following Judgment.

" The Court having heard the parties by their Counsel, examined the pro- " ceedings and evidence of Record and deliberated thereon; it is considered and " adjudged that the said Defendant do restore and deliver up to the said Plaintiff, " in the space of one month, the quantity of one hundred, and eighty five pine " logs, two hundred and sixty logs or pieces of square pine timber, eighteen " masts, and ten spars, which were by the said Defendant wrongfully cut down " in and upon the Estates and Seignories of the said Plaintiff, as mentioned in " his Declaration, and which have been seized and attached by virtue of the writ " of attachment or *Saisie Revendication* sued out in this cause, and in default of " restoring and delivering up to the said Plaintiff the pine logs, square pine tim- " ber, masts and spars, it is further adjudged that the said Defendant do pay the " value thereof to the said Plaintiff, according as the same shall be estimated by " experts to be named by the Parties or on their default by the Court; and it is " also adjudged that the Action and Demand aforesaid of the said Plaintiff, so " far as the same regards the cutting down, and carrying away the several " quantities of oak timber as mentioned in the said Declaration be dismissed, and " that the said Plaintiff do recover his costs up to the fyling of the Plea, the " subsequent costs to be paid by the Plaintiff to the Defendant."

From this Judgment the present Appeal has been instituted—Reasons of Appeal have been fyled by the Appellant, in which he alledges that plea of the said Respondent Alex. Phelps, and the Interventions fyled in the said Court below were insufficient and unfounded in law, and that the said Judgment hath been rendered contrary to law.

To these reasons a General Answer has been fyled, and in this state the Cause stands for hearing.

QUEBEC, Nov. 1816.

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